

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matter of:

5  
6 LEHMAN BROTHERS HOLDINGS, INC., Case No. 08-13555 (SCC)

7  
8 Debtor.

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12 U.S. Bankruptcy Court

13 One Bowling Green

14 New York, New York

15  
16  
17 September 21, 2015

18 10:12 AM

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20 B E F O R E :

21 HON SHELLEY C. CHAPMAN

22 U.S. BANKRUPTCY JUDGE

1     Hearing re:   Doc #50032 Motion for Summary Judgment  
2     Regarding Claim 67707

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25     Transcribed by:   Jamie Gallagher

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1 P R O C E E D I N G S

2 THE COURT: How is everyone today? All right,  
3 Mr. Miller, I'm ready when you are.

4 MR. MILLER: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. MILLER: I'm Ralph Miller from the Weil,  
7 Gotshal & Manges firm here on behalf of the plan  
8 administrator, Lehman Brothers Holdings, Inc., which is  
9 called LBHI and Lehman Commercial Paper, Inc., called LCPI.  
10 And the first agenda item, and the only agenda item is a  
11 motion for summary judgment on claim number 67707 brought by  
12 Spanish Broadcasting Systems.

13 The record before the Court establishes that LBHI  
14 and LCPI are entitled to summary judgment on two critical  
15 damage issues. First, a valid waiver of consequential and  
16 special damages applies to the claim in this proceeding.  
17 Second, at least 99 percent of the \$41.9 million in damages  
18 asserted in that claim are consequential or special damages.

19 Your Honor, may I approach with some excerpts from  
20 the record that will facilitate our discussions?

21 THE COURT: Sure. And the percentage that you  
22 referred to, the small percentage not included is the fee?  
23 Damages?

24 MR. MILLER: Yes, Your Honor.

25 THE COURT: Okay.

1 MR. MILLER: The -- it's the refund due for the  
2 portion of the fee that had to do with holding the \$10  
3 million. The distinction here is there were also fees for  
4 LCPI's agent for the group of banks.

5 THE COURT: Right. Right.

6 MR. MILLER: And those fees we believe are not  
7 returnable because LCPI completed its service.

8 THE COURT: Right.

9 MR. MILLER: So it's just separating that.

10 THE COURT: But Spanish Broadcasting, as part of  
11 its proof of claim, is seeking a refund of those fees?

12 MR. MILLER: That's correct.

13 THE COURT: Okay.

14 MR. MILLER: And, Your Honor, we've agreed to that  
15 refund. We believe it's about \$14,000 and they think it's  
16 somewhere over 400 -- around \$400,000 -- \$373,000. So  
17 that's the 1 percent is the 373 --

18 THE COURT: But in any event, I think you both  
19 agree that's not part of this motion

20 MR. MILLER: That's correct.

21 THE COURT: Okay.

22 MR. MILLER: Let me explain how I'd like to  
23 organize my comments, subject of course to any questions  
24 from the Court.

25 THE COURT: Okay.

1 MR. MILLER: First, I'd like to deal briefly with  
2 the irrevocable and unconditional waiver of any right of  
3 Spanish Broadcasting's claim for "special exemplary,  
4 punitive, or consequential damages" and show how it applies  
5 to this proceeding and then I'll deal with the discovery  
6 produced by Spanish Broadcasting that shows that the two  
7 major components of the claim are special or consequential.  
8 And --

9 THE COURT: And in that regard, also, Spanish  
10 Broadcasting makes the argument that, in essence, aha, there  
11 was all of this discovery and then you announced that this  
12 was ripe for summary judgment and then you didn't make any  
13 reference to any of that discovery. And from that, they  
14 urge an inference that the discovery was in their favor and  
15 that's why you didn't cite to it?

16 MR. MILLER: No.

17 THE COURT: So, do you know the part of their  
18 brief that I'm --

19 MR. MILLER: Yes, Your Honor.

20 THE COURT: -- referring to?

21 MR. MILLER: Yes, Your Honor. They're talking, I  
22 think --

23 THE COURT: You don't have to make the detour --

24 MR. MILLER: I'll be happy to --

25 THE COURT: -- just along the road -- just --

1 MR. MILLER: I'll be happy to deal with that as I  
2 go by, Your Honor.

3 THE COURT: Sure.

4 MR. MILLER: For example, the discovery having to  
5 do with the negotiation of --

6 THE COURT: Between the Weil firm and the Kaye  
7 Scholer firm?

8 MR. MILLER: -- of the payoff letter demonstrates  
9 that the provisions in issue that we think are material were  
10 not discussed. So in that sense, the discovery -- like the  
11 dog that did not bark in the night -- is important because  
12 it does not create any parol evidence that would be relevant  
13 on the language that's in issue.

14 Now, Ms. Primoff is going to talk about the word  
15 expressly, and I'll mention that as I go by. But we believe  
16 that's immaterial. So I think we do refer to it in a sense  
17 that we say that there's nothing in the discovery that  
18 changes the plain language of the documents that are before  
19 the Court and that confirms our view that discovery is  
20 sufficient for the Court to move forward with summary  
21 judgment.

22 Your Honor, if you could turn first to tab 1, it  
23 has the -- a flag by the operative waiver language. And I  
24 wanted to emphasize the word hereby and the structure of  
25 this a little bit because I'm not sure our briefs did this.

1 I always like to try to talk about something that's not in  
2 the briefs if I can, Your Honor.

3 Section 10.12, submission to waiver -- I'm sorry  
4 submission to jurisdiction; waivers says, "The borrower  
5 hereby irrevocably and unconditionally" and then it has five  
6 things that are done. One of which is submitting to  
7 jurisdiction in any legal action or proceeding relating to  
8 this agreement. That defines proceeding. Then we get down  
9 to (e), what the borrower hereby irrevocably and  
10 unconditionally does as of June 10th, 2005, is waives to the  
11 maximum extent not prohibited by law any right it may have  
12 to claim or recover in any legal action or proceeding  
13 referred to in this section, any special, exemplary,  
14 punitive or consequential damages.

15 The plain language of this, Your Honor, is that  
16 this is a waiver. It is an event and as the Court knows,  
17 waiver is defined under New York law as the voluntary  
18 relinquishment of a known right. It is an act. It is not a  
19 future promise. And that's going to become important when  
20 we get to the payoff letter, Your Honor.

21 Another thing that is important is you can take  
22 judicial notice of the economic reality that the waiver  
23 provision was necessarily priced into the deal, that when a  
24 loan is made, the terms impact the interest rate and the  
25 fees in that loan because if a lender is going to be exposed

1 to the panoply of arrange of future damages then it's got to  
2 build some additional risk into the interest rate. So all  
3 of the things about the waiver were set in time when the  
4 loan was priced at that point.

5 And there's no dispute about the fact, I think,  
6 among the parties that this kind of waiver can be valid and  
7 is enforceable under New York law. But as the Court  
8 noticed, Spanish Broadcasting argues that a document signed  
9 about six years later in 2012 called a payoff letter revoked  
10 the waiver and that the waiver that was hereby given was set  
11 aside. Now there are three important undisputed events  
12 before we get to the payoff letter.

13 Tab 2 is a notice of borrowing sent to an employee  
14 of LCPI on October 3rd, 2008. Obviously this was after LBHI  
15 had filed for Chapter 11 protection. And LCPI in that  
16 notice of borrowing asked for the draw to be made on  
17 October 6th. The day before that, October 5th, LCPI filed  
18 for Chapter 11 protection and Tab 3 is the response of LCPI  
19 as agent, which said that LCPI, as agent, would remit 15  
20 million of the 25 million. That came from the other banks.  
21 But that LCPI's share of the 10 million would not be  
22 remitted.

23 Now at that point, Your Honor, the breach of  
24 contract, which we admit occurred, was complete. There was  
25 an anticipatory repudiation. They said we're not going to

1 do it. They didn't do it. Damages came into existence at  
2 that point in time. The waiver was in effect. Tab 4 is an  
3 excerpt from the amended claim for damages that's allegedly  
4 caused by the failure to file -- to fund the 10 million. It  
5 has a report attached, which has this -- the Capstone (ph)  
6 report which has not been superseded by other reports, but  
7 it makes this reduction in invested capital argument.

8 So at this point, these things have all happened.  
9 Now let's turn briefly to the payoff letter that's in Tab 5.  
10 It's the key document for this first major issue, of course.  
11 And two parts are flagged here. First, there is the phrase  
12 in yellow that the credit agreement and all obligations of  
13 the borrower and other loan parties thereunder and under  
14 other loan documents shall be terminated, parenthesis --

15 THE COURT: Can I stop and ask you a question?  
16 What was the occasion for the entry into this payoff letter?

17 MR. MILLER: Yes, that's a very good question,  
18 Your Honor. This is a standard document. At this point,  
19 Spanish Broadcasting had a bunch of loans --

20 THE COURT: Right.

21 MR. MILLER: -- and Spanish Broadcasting wanted to  
22 pay them all off. And so an arrangement was made to pay off  
23 this collection of loans for the collection of banks, one  
24 subpart of which was the LCPI portion. So LCPI's agent was  
25 entering into this standard foreign document on behalf of

1 the bank group and Spanish Broadcasting is making the  
2 payment.

3 THE COURT: Uh-huh, it's here and in the recital  
4 it's Lehman, as administrative agent.

5 MR. MILLER: Yes, Your Honor, so this is not a  
6 deal between these two parties alone. It's a deal both  
7 between the larger bank group and between -- and Spanish  
8 Broadcasting. And frankly, one of the reasons that we think  
9 the discovery is relevant is this is form language, except  
10 for the word expressly, which they did add in in this  
11 parenthesis, that contingent obligations which expressly  
12 survive.

13 Well, Your Honor, in our view of the plain waiver  
14 language and the plain language here is a waiver is not an  
15 obligation. The waiver had nothing left to be done. Now  
16 this does not rescind the termination. I'm sorry, this does  
17 not rescind the credit agreement. It terminates the credit  
18 agreement. The credit agreement had future provisions that  
19 were in effect. Those future provisions were cut off.  
20 Nobody owed anything and the credit agreement was what it  
21 was. But it did not terminate whatever obligations had  
22 arisen in the past under the credit agreement. And that's  
23 what, by the way, a number of these cases hold that they  
24 cite that they don't distinguish.

25 And the only reference to the claim is the carve-

1 out in this last sentence of the release. There was a  
2 release -- there's a standard release included in these  
3 things -- and the standard release is broad. And there's a  
4 carve-out that says the forgoing release shall not apply to  
5 the proof of claim, claim number 67707, the one we're here  
6 for today, filed against Lehman on November 3rd, 2011, as  
7 such claim may be amended in accordance with the applicable  
8 law. It's just a carve-out. It doesn't increase the claim.  
9 It doesn't change the claim. It doesn't say the claim is --  
10 is not only released, but the consequential damage waiver is  
11 set aside. It just doesn't deal with any of that. This is  
12 not part of a negotiation over the claim. It's not a part  
13 of the resolution over the claim.

14 And it makes no economic sense at all that LCPI,  
15 as agent, would take a claim that was already sitting out  
16 there for 40 to \$50 million, depending upon how you read it,  
17 and just in order to get the money in the door that was  
18 already owed. We're not talking about profit here. We're  
19 talking about paying off the loan. To get the money in the  
20 door, they would give up their defense to 99 percent of the  
21 claim. That just makes no economic sense and it could not  
22 have been intended.

23 Now I assume that Spanish Broadcasting is to say,  
24 well, it's their intention to build in what I would  
25 characterize and say trap by adding the word expressly, and

1 it was their intention to try to cut off the waiver defense.  
2 I'll accept that as true. Maybe that was their intention,  
3 Your Honor. That's an immaterial fact because it was not  
4 expressed. It's not in the document. Nobody knew about it.  
5 So if they had that intent, fine, that can be taken as a  
6 true fact. It doesn't change anything.

7 So we believe, Your Honor, that this issue is  
8 simply a question of application of the plain language rule.  
9 You take the waiver. It's a waiver, it's over, it's done  
10 with. It applied at the time of all the material events.  
11 The claim existed. The claim was frozen. The claim could  
12 be amended. The claim was carved out of the release.  
13 Everybody went on down the road. And at that point, we have  
14 the same thing we would have before the Court if there had  
15 been no entry into this at all.

16 So, Your Honor, I think that's the simple  
17 approach. I'm happy to answer some questions. But we think  
18 you put these two documents together and they're essentially  
19 ships passing in the night. They're dealing with different  
20 points of time. The credit agreement governed the business  
21 between the parties. All the business between the parties  
22 was done up to the point when the loan was paid. And when  
23 the loan was paid, it was paid off. It didn't change the  
24 claim that arose.

25 It would be very much, by the way, like --

1 THE COURT: So let me ask you a law school  
2 hypothetical type of question. The credit agreement says  
3 borrower hereby --

4 MR. MILLER: Yes.

5 THE COURT: -- irrevocably and unconditionally  
6 waives.

7 MR. MILLER: Yes.

8 THE COURT: So it's interesting, right, because it  
9 says irrevocably.

10 MR. MILLER: It says that, Your Honor.

11 THE COURT: So in the payoff letter,  
12 hypothetically, completely contrary to what you've just  
13 argued, it could have said with reference to that certain  
14 Section 10.12 of that certain credit agreement, LCPI,  
15 notwithstanding the fact that it previously said  
16 irrevocably, hereby waives. It could have said something  
17 totally clear and crisp that purported to undo the waiver,  
18 but it did not. But I guess I'm just focused on the fact  
19 that -- what happens when somebody in a document, clear and  
20 unambiguous on its face, says it's doing something  
21 irrevocably.

22 MR. MILLER: Well, Your Honor, I think you point  
23 to a very clear issue which we talked about. There are some  
24 cases that say it's possible to waive a waiver.

25 THE COURT: Right, but --

1 MR. MILLER: But that has to be clear.

2 THE COURT: -- clear, right.

3 MR. MILLER: Now a lot of the cases, and in fact  
4 some of the cases cited by Spanish Broadcasting's briefing  
5 are implied waiver cases, where it's not really --

6 THE COURT: Sure.

7 MR. MILLER: -- clear whether a waiver happened or  
8 not. The Capital Records case is a good example. It's a --  
9 was there a waiver of copyright or not, because they didn't  
10 enforce the copyright over a period of time? And then they  
11 started enforcing -- trying to enforce the copyright and was  
12 it too late. And, you know, you get estoppel doctrines that  
13 say well, once parties have relied upon the waiver, it's too  
14 late to take it back. As long as the waiver -- if the  
15 waiver is a unilateral act, it's not a contract. We're  
16 doing the law school discussion, Your Honor.

17 THE COURT: Right.

18 MR. MILLER: Unfortunately, I've had a little more  
19 exposure to waiver than I'd like in my law career, but, you  
20 know, once it's done, it's done, but it has no consideration  
21 for it, unless it's part of a contract. And this had  
22 consideration. And part of the consideration was, you get  
23 the interest rate and the fees you get because you make this  
24 irrevocable removal of issues.

25 And this relates to what I'm going to talk about

1 in a minute. One of the reasons, Your Honor, which you can  
2 take judicial notice of and we all recognize, that  
3 commercial parties decide they don't want to hear about this  
4 list of damages that is here, special, exemplary, punitive,  
5 or consequential. It's because any litigation that has to  
6 sort out the categories of damages is a very difficult,  
7 complicated litigation. Each of these components has  
8 different elements from the other components. And we can  
9 talk about what all is required for consequential.

10 So you're going to have to classify it, by the  
11 way, whether it's special, or consequential, or the terms  
12 that are usually used -- they're synonymous terms in the  
13 case, just so you know, that are inconvenient. Special and  
14 consequential mean the same thing. And we have a footnote  
15 18 that talks about that.

16 The cases talk about direct, general, or sometimes  
17 they call it legal damages. I think the legal came from the  
18 old days when equitable was the alternative.

19 THE COURT: Right.

20 MR. MILLER: So the answer is, Your Honor, that  
21 these kinds of waivers make the deal much less expensive if  
22 there's a dispute.

23 THE COURT: But you -- I don't -- I mean, I think  
24 that is something that we could say we "know", but that at  
25 least my view is for the purposes of granting summary

1 judgment to you, I ought not get into that because --

2 MR. MILLER: I don't think you have to get into  
3 it, Your Honor, but --

4 THE COURT: -- because -- and I don't think I have  
5 to get into it because the document says what it says and  
6 whether or not on this occasion it affected the pricing or  
7 not, this was the deal.

8 MR. MILLER: That's correct, Your Honor.

9 THE COURT: In the credit agreement, this was the  
10 deal, no consequential. No special, exemplary, punitive, or  
11 consequential. This was the deal.

12 MR. MILLER: That's correct, Your Honor. This was  
13 the deal. And that -- a deal is a deal is essentially all  
14 the argument we're making here. And it was a commercial  
15 deal between sophisticated parties and what happened later,  
16 we think in the payoff letter did not join with it in any  
17 way that could modify that language. It should -- if they  
18 wanted to modify it, they could have expressly done it.  
19 Everybody would have said -- and I think we can almost  
20 certainly represent to the Court that LCPI would have said,  
21 what, you're crazy. Of course we're not going to do away  
22 with the waiver. But, you know, you don't have to know that  
23 information.

24 The point is, that was not the exchange. The  
25 discovery has shown there's nothing left to be discovered.

1 The facts are complete. That conversation didn't happen.  
2 Now if somebody had sent an e-mail and said, you know, we do  
3 need to be getting rid of the waiver and somebody -- while  
4 -- and said yes, well, of course, we know that. That might  
5 create a fact issue, Your Honor.

6 THE COURT: Right. Right.

7 MR. MILLER: I recognize that. That didn't  
8 happen. We didn't think it happened, but that's why we  
9 wanted some discovery, Your Honor.

10 I would like to turn now, if I might, because I  
11 think it's important to this issue as well to the question  
12 of what their damages are that they are claiming and why we  
13 believe that as a matter of law those are special or  
14 consequential. And for that purpose, I do want to note, by  
15 the way, the timeline again on Tab -- in Tab 9, which shows  
16 all the things that had happened and come into play before  
17 the payoff letter and the fact that the events giving rise  
18 to what we're going to talk about now were all over and done  
19 with before the payoff letter.

20 THE COURT: Tab 9?

21 MR. MILLER: Tab 9. I'm sorry. I misspoke, Your  
22 Honor. I'm reading the backside of it. And it's upside  
23 down on the backside. It's Tab 6.

24 THE COURT: Okay. Yes, okay.

25 MR. MILLER: The -- Your Honor, if we turn now and

1 skip over to Tab 10, and actually before I go there, I'd  
2 like to say that there is a convenient summary of the  
3 damages in the response to the motion on page 10 where  
4 Spanish Broadcasting says, "As set forth in the Garcia  
5 declaration, the Currents (ph) report, and the Trautman (ph)  
6 report, the failure of Lehman to fund the draw caused  
7 Spanish Broadcasting to suffer damages in the aggregate  
8 amount of 41.9 million, which is comprised of: A) damages in  
9 the amount of 24,500,000 (the "impacted EBITDA -- that's E-  
10 B-I-T-D-A damages" resulting from Spanish Broadcasting's  
11 lack of \$4 million in funds needed for marketing expenses);  
12 B) damages in the amount of \$17,054,558, the "swap damages",  
13 resulting from Spanish Broadcasting's lack of capital to  
14 terminate and close out the swap in October of 2008.

15 THE COURT: So -- I mean, so there's a lot in  
16 there too. I mean, the --

17 MR. MILLER: Yes.

18 THE COURT: -- the so-called inability to close  
19 out the swap --

20 MR. MILLER: Yes.

21 THE COURT: -- is kind of problematic on a number  
22 of levels.

23 MR. MILLER: Yes, it is, Your Honor.

24 THE COURT: Okay.

25 MR. MILLER: And as I'm going to explain in a few

1 moments, these are essentially sort of Rube Goldberg  
2 cartoons. This happened. That happened. Something else  
3 happened, and over here there's a result. There's a lot of  
4 distance between not having \$10 million in 2008 that had to  
5 be paid back and getting to, in this case, \$4 million has a  
6 \$6 million multiplier and becomes \$24 million in damages.  
7 So I'll get to that in just a moment.

8 First, I think it might be helpful to talk about  
9 one case that I think is really a controlling and important  
10 case on this and that's Avalon Construction Company versus  
11 Kirsch Holding. It's an old case, but it's the New York  
12 Court of Appeals and we believe it's still perfectly good  
13 law. It's a little bit dense, but it's well-reasoned.

14 The Court starts out and explains what the rule is  
15 when a loan is repaid late. The Court says, and this is  
16 looking at, you know, what are the damages if the lender  
17 doesn't perform. The Court says, "When money is loaned or  
18 goods sold on credit and the debt is not paid when due,  
19 obviously the delay occasions the creditor nothing more than  
20 the temporary loss of its use of its money. For this loss,  
21 the law compensates the creditor with an award of no greater  
22 or other sum than legal interest."

23 Then the Court of Appeals cites to two  
24 commentators who support that and it goes on and it says,  
25 "Logically, a prospective borrower, whose contract for a

1 loan has been breached, should stand in no better case. His  
2 money loss is likewise nothing else than the loss of its use  
3 for a limited period. However, the interest charged, which  
4 would measure that loss, merely cancels the interest charge,  
5 which would measure the loss of the lender had the loan been  
6 made so that if a balance be struck, no loss is found.  
7 Consequently, reason compels and all authority supports the  
8 conclusion that a breach of contract to make a loan,  
9 standing by itself, involves no legal damage." And here,  
10 it's using the term legal damage to mean the same thing as  
11 direct or general.

12 Then it has about a dozen citations -- excuse me,  
13 Your Honor -- and then it cites Sedgwick on damages as  
14 saying, "Upon breach of a contract to loan money if no  
15 special damage is shown, the recovery is only nominal. For  
16 though by the contract, the plaintiff would receive the  
17 amount of the loan, it would be saddled with an obligation  
18 of exactly the same amount so that the profit of the  
19 contract would be nothing." And Williston is then quoted by  
20 the New York Court of Appeals to say, "Breach of a contract  
21 to lend money for whatever period at the current rate of  
22 interest or whatever rate of interest for no definite term,  
23 involves no legal damage." Again, legal meaning direct or  
24 general. "Unless consequential damages are recovered."

25 So the New York Court of Appeals has said in their

1 other cases in New York that we cite that make this point  
2 that when a loan is not made, what happens is a party has a  
3 temporary loss of use of money. Now if the party goes out  
4 and borrows that money at their alternate rate, that clearly  
5 is a damage.

6 THE COURT: The delta between the contracted for  
7 rate and what the market, if the market has moved up then  
8 the additional cost of capital isn't recoverable damage?

9 MR. MILLER: That's correct, Your Honor. It's  
10 very much like the concept of cover under the Universal  
11 Commercial Code. If a party doesn't get their widgets and  
12 they go out and they buy other widgets, and they have to pay  
13 more for it because of the timing change, they get the  
14 difference in price. So it's a concept of cover, that's  
15 true.

16 And we also believe, by the way, that if there  
17 were fees paid to hold this money and those fees were -- did  
18 not produce a benefit, they would be refunded. So we think  
19 that's a direct damage.

20 THE COURT: But for example, if the funding on day  
21 one was -- were necessary to close a transaction scheduled  
22 to occur later on day one, that if it did not occur and the  
23 purchase price, if you will, on the transaction went up --  
24 so it's the morning of day one --

25 MR. MILLER: Yes, Your Honor.

1 THE COURT: -- there's a loan. It doesn't close.  
2 In the afternoon of day one, the borrower was to have used  
3 the funds to purchase widgets and there's a time of the  
4 essence clause, I'm making this up, with respect to that  
5 contract, and then the -- and it's a \$10,000 a day penalty  
6 to still buy the widgets. If there's a waiver of  
7 consequential damages, that incremental cost of buying the  
8 widget, assuming that there can be a cover in funding the  
9 next day, is for the borrower/purchaser's account. It's  
10 not --

11 MR. MILLER: That's absolutely correct, Your  
12 Honor --

13 THE COURT: -- not recoverable against a lender  
14 who failed to close on the morning of day one.

15 MR. MILLER: That's correct.

16 THE COURT: Right?

17 MR. MILLER: And conveniently, one of the things  
18 about a waiver is you don't have to deal with the  
19 foreseeability element of consequential damages. In the  
20 example that you gave, if the lender knew that this was for  
21 a transaction in the afternoon, at least the foreseeability  
22 and understanding -- the term is actually foreseeable and  
23 within the contemplation of both parties. That was the term  
24 of the Tractebel case in the Second Circuit. If that  
25 element is met, and if there is no waiver, that might be a

1 consequential damage.

2 THE COURT: Right.

3 MR. MILLER: There's no doubt, Your Honor.

4 THE COURT: But if there is --

5 MR. MILLER: If it's a waiver, it's a  
6 consequential damage. It's -- because we don't know -- it's  
7 certainly possible that they might be able to turn around  
8 and borrow that money between the morning and the afternoon,  
9 they're just going to have to pay a higher interest rate, in  
10 which case, it's -- that would be a direct damage. If they  
11 had to turn around, to take your hypothetical, at noon, they  
12 drew -- maybe they owe a line of credit, that was more like  
13 credit card rights, and they had to draw on it for a couple  
14 of days. And they drew on it, did the deal, got permanent  
15 financing so their -- you know, had a higher interest rate  
16 for a few days, all that stuff could be and would be direct  
17 or general or legal damages.

18 But significantly, and the facts are, and this is  
19 in the record, and it's admitted in the exchange about  
20 undisputed facts. Originally, Spanish Broadcasting put in a  
21 claim for increased cost of alternate financing, but then it  
22 has formally withdrawn that claim. So that element -- the  
23 direct damages have been taken out of this case by the facts  
24 and it's not like they overlooked it. They decided to take  
25 it out.

1           So that particular element is gone and all that's  
2           left of direct damages in our view is this fight about how  
3           much of the fee went with something else.

4           Continuing, Your Honor, just a little bit more and  
5           I'm making good progress on this, is let's talk a little bit  
6           about the impacted EBITDA damages. The Trautman report on  
7           Tab 10, which has a flag, explains how they say this chain  
8           would have occurred. And the first thing that he does is he  
9           takes an assumption. He doesn't actually have any facts for  
10          the second sentence. In fact, this is --

11          THE COURT: Well, before you even get there, I  
12          mean, don't I get to decide what'd direct and what's  
13          consequential damages?

14          MR. MILLER: Absolutely you do, Your Honor. You  
15          have to. You have to decide that --

16          THE COURT: I mean in the --

17          MR. MILLER: -- to charge a jury if you had a  
18          jury.

19          THE COURT: Right. I mean, it's a legal  
20          determination.

21          MR. MILLER: It's a legal determination, Your  
22          Honor. It certainly is.

23          THE COURT: And Ms. Primoff is shaking her head  
24          behind you, but, I mean --

25          MR. MILLER: Well, I mean, their contention is we

1 ought to be able to let our expert tell you what's the  
2 difference because they're going to -- I mean, I don't want  
3 to anticipate her story too much, but I've heard it and read  
4 it. They're going to say if our expert gets up and says  
5 it's a natural and probable consequence of not having \$10  
6 million in September of 2008 that over a period of time we  
7 lose \$25 million, boom, that makes it direct damages.

8 THE COURT: Well, I'm willing to listen to an  
9 expert on doing the math, but I'm not willing to listen to  
10 an expert tell me how to make the legal determination of  
11 which damages are which damages. So --

12 MR. MILLER: And you shouldn't, Your Honor,  
13 because the case law is very clear that that's your  
14 decision. And again, if you think about this context in a  
15 jury trial, and I realize we're going to have a jury trial,  
16 the judge has to decide, before the Trier of Fact comes in,  
17 what set of rules to give the jury and has to tell them if  
18 you find this set of facts then you can award these kind of  
19 damages, if you find that sets of facts then -- and, you  
20 know, punitive damages, we know that all these damages  
21 circles are used in reference to a VIN diagram recently.  
22 The circles of damages do not overlap. Some are contained  
23 within others and so on, but there's different elements. So  
24 you're absolutely correct, Your Honor.

25 But anyway, he doesn't actually have anything

1 about why \$4 million was not used. He makes an assumption.  
2 My understanding is that it was intended for working capital  
3 purposes, which he recites, and SBS would have used 4  
4 million of the 25 million for the purpose of marketing and  
5 promoting its radio properties. Okay. He makes that  
6 assumption.

7 THE COURT: But also, they got 15.

8 MR. MILLER: They got 15, Your Honor, and,  
9 actually, the record shows, if you'll --

10 THE COURT: And I think the record shows that they  
11 actually, when all is said and done, for example, had enough  
12 cash on hand --

13 MR. MILLER: Yes.

14 THE COURT: -- to have been able to pay off the  
15 swap termination when it should have terminated.

16 MR. MILLER: Yes, and they actually had enough for  
17 this 4 million, too. And also, Your Honor, I mean, let's --  
18 again, they made a public statement, which is in the record,  
19 that the failure to get the \$10 million is not going to  
20 affect their short-term liquidity. This is actually at Tab,  
21 I believe it's Tab 8. Tab 8, Your Honor, has the fact that  
22 they had \$32 million in cash at the end of 2008 and Tab 9  
23 has the quote that says "We are exploring options to replace  
24 Lehman's commitment within the revolver, but we cannot  
25 guarantee we'll be able to do it" is what it says basically.

1 And it says "However, we believe that we have sufficient  
2 liquidity to conduct our normal operations and do not  
3 believe that the potential reduction in available capacity  
4 under this revolver would have a material impact on our  
5 short-term liquidity." So that's --

6 THE COURT: But again, you know --

7 MR. MILLER: -- an admission. You don't have to  
8 consider that.

9 THE COURT: But once again, this is in the  
10 category of, in your view, I don't even have to get here and  
11 talk about all of this because it doesn't get past the  
12 threshold legal determination in terms of its qualification  
13 or lack thereof as a consequential damage.

14 MR. MILLER: Absolutely, Your Honor. And it also  
15 though does show that -- it shows that the very performance  
16 promised, which is another test for direct damages, does not  
17 include anything that's talked about in the Troutman or the  
18 Kerns report. Nothing in the credit agreement says we are  
19 funding a specific amount of marketing expenses or it says  
20 we're loaning this money to you so you can pay off your swap  
21 or it's not a special purpose. Well, it's plenty sponge-  
22 able and that's one of the things that happens, of course,  
23 Your Honor.

24 If you go back to Tab 10, which is what I was  
25 talking about, the next part of the explanation, the second

1 flag here, I believe, is the discussion of how -- actually,  
2 it's the next highlight. It's on the bottom of the next  
3 page. This is his explanation of what I would call the "for  
4 want of a nail the shoe was lost, for want of a shoe the  
5 horse was lost, for want of a horse the battle was lost"  
6 argument.

7 And he says "Whether for SBS or any other owner of  
8 radio stations, limitations on the ability to adequately  
9 market/promote would be expected" -- and, interestingly,  
10 that's underlined -- "to eventually result" -- eventually  
11 result -- "in declining ratings and brand awareness/identity  
12 and would, in turn, be expected to result in poor  
13 advertising sales performance in relation to competing  
14 stations and it would have an increasing impact in time  
15 because of the pre-existing audience affinity and awareness  
16 diminishing and then it would stabilize at a new lower  
17 normal."

18 This is the tale of where all this goes. Now,  
19 conveniently, a very similar case was decided by Judge  
20 Rakoff when he applied the Tractebel Energy ruling which is  
21 another significant guidepost that you have here, Your  
22 Honor. In Tractebel the Court explained that prototype  
23 consequential damages arise from collateral losses in  
24 collateral business arrangements.

25 In this case, by Judge Rakoff applying that rule,

1 is compania intel, but they, I'm sorry, embotelladora, I'm  
2 not doing it very well. Embotelladora del Pacifico, it  
3 means the bottling company of the pacific and it was the  
4 PepsiCo Bottler and he called it by the initials CEPSA so  
5 I'm going to call it CEPSA, if that's okay.

6 CEPSA claimed that PepsiCo had allowed other  
7 bottlers to sell Pepsi products in its territory in  
8 violation of an exclusive bottling agreement which was  
9 called EBA. And poaching on the exclusive sales territory  
10 was claimed by CEPSA to have caused it to lose sales of  
11 Pepsi from its bottling facilities. Now, this damage theory  
12 is actually less convoluted than the one we just read, but  
13 it's still a chain that's similar to the impacted EBITDA  
14 damages because in both cases the damages were claimed to be  
15 the loss of sales to third parties.

16 In CEPSA, the third-party purchasers were drinkers  
17 of Pepsi who bought from other bottlers and here the third-  
18 party purchasers are advertisers who would purchase more air  
19 time, he says, from Spanish Broadcasting if they had had  
20 more promotion. Now, Judge Rakoff had no difficulty in  
21 finding that CEPSA was making a claim for consequential  
22 damages under the Tractebel Energy ruling. He wrote:

23 "Here CEPSA is plainly not seeking to recover  
24 money that PepsiCo agreed to pay under the EBA" -- and he  
25 cites Tractebel -- "instead CEPSA is seeking to recover lost

1 profits from lost sales to third parties that are not  
2 governed by the EBA. Such damages are properly  
3 characterized as consequential damages because as a result  
4 of PepsiCo's alleged breach, CEPESA suffered lost profits on  
5 collateral business arrangements, i.e. sales of PepsiCo  
6 products to its customers throughout its exclusive  
7 territory."

8 I believe his analysis was correct and I believe  
9 it's right on point and it is the short answer to why the  
10 impacted EBITDA damages are consequential or special as a  
11 matter of law. In addition to, by the way, the rule under  
12 the Avalon case, another case, that says when you're dealing  
13 with a special circumstance of loaning money, everything  
14 except things about the interest rate and fees is  
15 consequential. So just the general analysis works.

16 Finally, Your Honor, Tab 11 is the Kerns report  
17 and this has to do with the swap damages. Now, the swap  
18 damages are kind of another long story. There was a swap.  
19 It was a hedging swap. I believe the record shows that they  
20 could have gotten the hedging swap anywhere, but they got it  
21 from LBSF. That really doesn't matter why they had the  
22 swap.

23 The swap was in the money to LBSF and out of the  
24 money to Spanish Broadcasting in mid-October when LBHI's  
25 filing created an event of default and gave SBS the right to

1 terminate. What Spanish Broadcasting decided to do,  
2 however, was not to terminate. So they picked a point in  
3 time out here and if you look at this subparagraph little I  
4 in Tab 11, at the time of the of the failure of the fund  
5 which would have been October, they say the swap was out of  
6 the money \$6 million. That amount may be in dispute but it  
7 really doesn't matter too much. It was clearly out of the  
8 money. They would --

9 THE COURT: It continued to move against them.

10 MR. MILLER: It continued to move against them and  
11 they actually never terminated the swap until they entered  
12 into a settlement agreement at mediation and agreed to pay  
13 \$15,395,737 which is over here on the next column. And so  
14 his theory is that they paid this extra \$9 million plus they  
15 had some extra fees for \$10 million.

16 For some reason they say it's 17 million and I  
17 don't know where the rest of the money comes from, but in  
18 any event, the whole point of this, Your Honor, is a whole  
19 lot of things contributed to this loss. First, that this  
20 swap happened to be out of the money. Second, they decided  
21 to ride the market. Third, the market moved against them  
22 and they didn't terminate anywhere along the way and  
23 finally, somehow or another, they had enough to pay \$15  
24 million and they did terminate later.

25 So this is collateral business relationships.

1 LBSF is the third party. This is not -- LCPI and LBSF are  
2 separate businesses and this is their saying we ended up  
3 paying more money to a third party because you didn't give  
4 us this -- by the way, it's only the \$6 million and the ten  
5 and they don't say why they didn't use any of the other 15  
6 or why they didn't use the 32 million. Those would all be  
7 fact issues going forward. You don't need to deal with  
8 them.

9 So we just don't believe that these swap  
10 termination damages could possibly be the value of the very  
11 performance promised or the very performance that was  
12 promised by the credit agreement. So it has to be  
13 consequential, it has to be special and the way it replies  
14 to it.

15 I just want to close with one important conceptual  
16 point because the administration of a bankruptcy state and  
17 that is that if commercial transaction has to produce  
18 litigation over what is special and consequential damages  
19 and the kind of litigation that we're talking about here,  
20 that's detrimental to the creditors and a very extensive  
21 process and it's a great burden on the Court.

22 And Spanish Broadcasting and LCPI were  
23 sophisticated parties. They bargained for a simple, clean,  
24 commercial transaction that didn't have this expense and  
25 this uncertainty and we believe that the contract she be

1 enforced as written because that will achieve really what  
2 the parties intended when they went into the bargain and  
3 that is a clean transaction that can be paid off, that can  
4 be terminated. And if there were damages, they should not  
5 have been a great burden on either party.

6 THE COURT: Mr. Miller, before you sit down, could  
7 you, in the portion of the Kern's report that's attached  
8 behind Tab 11, so it's got total swap damages as \$17 million  
9 and then it says costs related to swap termination. So the  
10 proof of claim now seeks to recover on account of the swap  
11 failure to fund, if you will, this \$10 million number? See  
12 on page -- it's in little 1.

13 MR. MILLER: Yes, I see, Your Honor.

14 THE COURT: You see?

15 MR. MILLER: Actually, I think what he does, Your  
16 Honor, is he calculates this \$10 million and then he says  
17 they would have saved on borrowing costs --

18 THE COURT: It would have saved the money that --

19 MR. MILLER: -- by \$6 million --

20 THE COURT: Right.

21 MR. MILLER: -- more dollars. So they put -- you  
22 know, they say that they had additional interest expense of  
23 some kind because, I guess --

24 THE COURT: So the swap payment would have been 6  
25 million. They ultimately settled it --

1 MR. MILLER: For 15.4 million.

2 THE COURT: -- 15. So they paid that but then  
3 they're backing out the six.

4 MR. MILLER: They said if they had had the ten  
5 they would have used it to pay the six.

6 THE COURT: Right. But then, on top of all this,  
7 they're adding an investment banker fee of \$425,000 and  
8 \$500,000 legal fees for -- is that what it is?

9 MR. MILLER: Apparently. I don't know, Your  
10 Honor. You're going to have to ask --

11 THE COURT: Is that -- okay.

12 MR. MILLER: But that seems to be what is says  
13 and, of course, Your Honor, if they had had the \$10 million  
14 draw they would have also had interest on the \$10 million  
15 draw. So they would have been borrowing the \$10 million.  
16 So I don't see an adjustment in here anywhere but maybe it's  
17 built into --

18 THE COURT: Okay.

19 MR. MILLER: -- the calculation for the interest.  
20 But the point is, again --

21 THE COURT: In any event, in your view, it doesn't  
22 matter, it's consequential.

23 MR. MILLER: Your Honor, this actually parts back  
24 to a very perceptive statement by Judge Peck in the  
25 sufficiency hearing where he said "The claims being asserted

1 here are bloated, excessive and probably not allowable, but  
2 I'm not ruling on that." That is obviously our belief about  
3 these claims but that doesn't -- that's not the basis for  
4 the summary judgment. The basis for the summary judgment is  
5 the waiver and then, as a matter of law, the discovery shows  
6 they are consequential or special.

7 THE COURT: All right. Thank you.

8 MR. MILLER: Thank you, Your Honor.

9 MS. PRIMOFF: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MS. PRIMOFF: Madlyn Primoff of Kaye Scholer on  
12 behalf of Spanish Broadcasting. Let's spend a moment, if we  
13 can for Your Honor, on the legal standard applicable to  
14 Lehman's summary judgment motion.

15 THE COURT: You don't have to.

16 MS. PRIMOFF: Okay.

17 THE COURT: I know what it is.

18 MS. PRIMOFF: On the facts, it's very important  
19 that as Mr. Garcia, the CFO, says in his affidavit, Spanish  
20 Broadcasting didn't event this working capital facility on  
21 their own. Lehman was the one who told them that they  
22 needed to work on capital facility and they --

23 THE COURT: What does that have to do with  
24 anything?

25 MS. PRIMOFF: Because the working capital facility

1 was intended to be for rainy day money and at the time they  
2 drew down on the facility it wasn't just raining, it was  
3 pouring. Spanish Broadcasting had a desperate need for  
4 these funds and Lehman didn't provide them and as a result  
5 of that Spanish Broadcasting was left with dangerously low  
6 cash reserves as set forth in Mr. Garcia's declaration. It  
7 didn't have either the 6 million that it needed to terminate  
8 the swap. It didn't have the 4 million --

9 THE COURT: It didn't have the 6 million it needed  
10 to terminate the swap. Are you sure about that? Not that I  
11 think it's relevant, but are you sure about that?

12 MS. PRIMOFF: They had the money in the bank, but  
13 in the judgment of the CFO, they could not have used the  
14 funds for that purpose. The failure to fund the draw left  
15 Spanish Broadcasting severely undercapitalized and this is  
16 all in -- I'm not making this up. This is all in Mr.  
17 Garcia's declaration.

18 THE COURT: I understand, but what you're doing is  
19 telling me -- there's very, very crystal clear language in  
20 the credit agreement and instead of starting there and  
21 trying to explain to me why that crystal clear language  
22 isn't the beginning and the middle and the end of the story,  
23 you are drawing my attention to all this other stuff that's  
24 happening over here that suggests that your client and the  
25 claimant, you know, was in dire straits.

1 But there's a contract. It's called a credit  
2 agreement. It was negotiated between two sophisticated  
3 parties and it's got crystal clear language in it and under  
4 first year law school principles of contract interpretation,  
5 in the absence of any ambiguity of that language, I'm stuck  
6 with it. And that language here is a waiver that says in  
7 the clearest possible terms that these damages are hereby  
8 irrevocably and unconditionally waived. Period. That's  
9 where you got to start.

10 MS. PRIMOFF: Okay.

11 THE COURT: Okay.

12 MS. PRIMOFF: I will start there, Your Honor.

13 THE COURT: I'm sorry. I --

14 MS. PRIMOFF: No, no worries. No worries.

15 THE COURT: No, I spent the weekend with this so I  
16 do, not surprisingly, have a clear view of what I'm  
17 interested in.

18 MS. PRIMOFF: Okay.

19 THE COURT: Okay. So --

20 MS. PRIMOFF: No, we appreciate Your Honor's time  
21 and attention and --

22 THE COURT: Okay.

23 MS. PRIMOFF: -- I'm going to start where you'd  
24 like us to start.

25 THE COURT: So get me out of that because that

1 language is, you know, 10.12, it's kind of a showstopper.

2 MS. PRIMOFF: But it's not because the law is that  
3 -- and it's Judge Cardoza, "those who make the contract can  
4 undo it" and Nassau Trust, which is the prodigy for all of  
5 these cases that Lehman cites also says --

6 THE COURT: Okay. So then you are agreeing that  
7 Section 10.12, by its terms, on its face, is in fact a  
8 waiver of special exemplary, punitive and consequential  
9 damages.

10 MS. PRIMOFF: When it was made and what we're  
11 suggesting to the Court is that subsequent events caused  
12 that waiver to be unwound, terminated.

13 THE COURT: Well, it's not that subsequent events  
14 can cause it to be unwound, it would have required that the  
15 beneficiary of the waiver, LCPI, in clear and unequivocal  
16 and unambiguous language would have had to say never mind,  
17 remember that waiver that I gave you, I hereby revoke the  
18 waiver and you can sue me for consequential, et cetera, et  
19 cetera damages and it never said that. It never said that.

20 Indeed, it is -- I think there was the word silly  
21 somewhere in here, but I would say as a rational economic  
22 actor and indeed one who owed fiduciary duties to estates at  
23 that point, why would a revocation of this waiver have been  
24 given at that subsequent point in time? There's no  
25 plausible explanation for that. What was in it for LCPI to

1 say, never mind, you're right, I looked at this forty-odd  
2 million dollar claim you filed. You waived the ability to  
3 seek consequential damages but, never mind, we'll agree to  
4 let you recover those now?

5 MS. PRIMOFF: Okay. We're getting repaid several  
6 hundred million dollars on the credit facility. That was  
7 the context in which the payoff letter arose so Spanish  
8 Broadcasting was refinancing its big credit facility --

9 THE COURT: Right.

10 MS. PRIMOFF: -- through the capital markets and  
11 in connection with that the parties negotiated a payoff  
12 letter and they negotiated precisely which terms of the  
13 credit agreement and in the payoff would survive that  
14 termination.

15 THE COURT: And so in the payoff letter there is  
16 no reference to Section 10.12 of the credit agreement.

17 MS. PRIMOFF: Right. And the payoff letter is  
18 drafted to say these are the only provisions that survived  
19 and that's the normal law. The ASCAP decision cited in our  
20 case says that the -- it says "Ordinarily, contract  
21 provisions do not continue to bind --"

22 THE COURT: At that point Spanish Broadcasting  
23 owed the money. They owed the money. There was -- your  
24 hypothesis is that LCPI voluntarily and knowingly and  
25 intentionally undertook to take exposure to a \$40 million

1 claim it did not have in order to provide the means or the  
2 occasion or to facilitate the repayment by Spanish  
3 Broadcasting of money that it owed.

4 MS. PRIMOFF: I don't know why they did what they  
5 did. I know that it was our intent through the drafting of  
6 the payoff letter provisions on survival --

7 THE COURT: So where's the email that says, hey,  
8 we're revoking the waiver? Where is that email?

9 MS. PRIMOFF: Well, there are provisions  
10 throughout the payoff letter that say these provisions  
11 survive, these provisions survive. It doesn't say 10.12  
12 survives. It doesn't say it and that's the law. The law is  
13 it had to say it.

14 THE COURT: That's not the law.

15 MS. PRIMOFF: Okay.

16 THE COURT: A waiver is not an obligation. A  
17 waiver is not an obligation. A waiver is an act. It occurs  
18 at a point in time. It's not continuing. It occurred.  
19 It's over. It's not an ongoing obligation. It's not an  
20 executory obligation. It occurred. It's over.

21 MS. PRIMOFF: Your Honor, this was the substantial  
22 back and forth over Section 4 of the payoff letter and it  
23 went on for nine days and it's described in detail in the  
24 Getlitz (ph) declaration and my partner, Ms. Getlitz, was  
25 the drafts person -- I mean, Lehman was the drafts person

1 but --

2 THE COURT: Well, Mr. Miller has already said that  
3 I could assume that that's absolutely what she had in mind  
4 and it doesn't make a wit of difference.

5 MS. PRIMOFF: But it does because the party's  
6 intent is at issue --

7 THE COURT: No, it's not -- the parties can't  
8 secretly have an intent and it only be known to one party  
9 and it not be known to the other party.

10 MS. PRIMOFF: We submit it was known to all  
11 parties.

12 THE COURT: If you're right then you win today  
13 because then that individual is going to get on the witness  
14 stand and she's going to testify consistent with her  
15 affidavit and she's going to say exactly what she said in  
16 the affidavit and there's going to be no ability to cross-  
17 examine her and it's game over.

18 MS. PRIMOFF: No, what we're suggesting is that  
19 the -- it's a question of intent of the parties as to  
20 whether the waiver survived or not.

21 THE COURT: The other party doesn't have the  
22 intent. You're positing that SBS's intent, albeit not  
23 reflected in a document anywhere, is what has to prevail and  
24 I'm suggesting to you that all the time parties come in in  
25 the face of a clear document and say, oh, well, that wasn't

1 the intent. Well, but it doesn't work that way. One party  
2 can't have a secret intent and then when there's a problem  
3 have that prevail over what the words of the document say.

4 If that is in fact what was happening then these  
5 highly sophisticated lawyers could have very easily written  
6 a provision that says for the avoidance of doubt -- I could  
7 give you six different versions. For the avoidance of  
8 doubt, the waiver that was irrevocably given pursuant to  
9 Section 10.12 is hereby revoked notwithstanding anything to  
10 the contrary therein. That didn't happen.

11 The notion that LCPI was going to give up a waiver  
12 that it was being alleged had a dollar sign of \$40 million  
13 on it, that it was going to give that up and undo that as a  
14 necessary element of getting Spanish Broadcasting to repay  
15 money it already owed, it's implausible. It makes no sense.

16 MS. PRIMOFF: Your Honor, we suggested that's  
17 precisely why the parties went back and forth for nine days  
18 over this issue. It was back and forth, back and forth,  
19 back and forth.

20 THE COURT: And all you got after the back and  
21 forth was an agreement that the release, that you still had  
22 the right to prosecute the claim. There was nothing that  
23 said that LCPI didn't have the right to continue to assert  
24 its rights, as they then existed, which were that there was  
25 a waiver of special exemplary punitive and consequential

1 damages.

2 They wanted everything to go away. They didn't  
3 get that. But you didn't get a concession on their part  
4 that they didn't still hold whatever defenses to the proof  
5 of claim they had going into that discussion.

6 MS. PRIMOFF: Well, Ms. Getlitz's view is that it  
7 was the intent of the parties that the waiver survived. And  
8 we're not saying we win today.

9 THE COURT: Ms. Getlitz's view is that that was  
10 maybe her intent, but --

11 MS. PRIMOFF: Well, on behalf of Spanish  
12 Broadcasting.

13 THE COURT: Right. But it's not the parties.

14 MS. PRIMOFF: Well, we believe that there is a  
15 fact question as to what the intent of the parties was and  
16 we're not saying we win that today, but we are saying we're  
17 entitled to a trial on that issue. I'll turn to the  
18 characterization of the damages as --

19 THE COURT: Sure.

20 MS. PRIMOFF: -- directed. The damages arise from  
21 the failure to fund the working capital facility. It's set  
22 forth in both the Garcia declaration as well as the Kerns  
23 affidavit that the funds were going to be used to terminate  
24 the swap and the 4 million for normal marketing and  
25 promotional expenses. It's also set forth in both of those,

1 the Garcia declaration and the Kerns affidavit, that Spanish  
2 Broadcasting could not find this \$10 million anywhere in the  
3 market. It was not available.

4 They went to the other revolving credit facility  
5 lenders and asked them to fund and they would not and the  
6 credit facility loans were trading at 58 cents on September  
7 30, '08 and 38 cents on December 31. So nobody is going to  
8 lend 100 cents to get something that has a market value of  
9 38 cents.

10 THE COURT: Why do you need an investment banker  
11 to terminate a swap? Why do you need a half million dollars  
12 in legal fees to terminate a swap?

13 MS. PRIMOFF: I can explain that. The delta  
14 between the 6 million and the 15 million they ultimately  
15 paid --

16 THE COURT: Right.

17 MS. PRIMOFF: -- let's just call that ten --

18 THE COURT: Right.

19 MS. PRIMOFF: -- and because of that ten, when  
20 they did the refinancing they had to borrow \$10 million  
21 more. So what Mr. Kerns did was he took the present value  
22 of the \$10 million --

23 THE COURT: No, no, no. In Mr. Kerns' affidavit  
24 there are line items called additional swap damages incurred  
25 to terminate the swap, (indiscernible) management,

1 investment banker fees \$525,000 and estimated legal and  
2 other costs at half million dollars.

3 MS. PRIMOFF: The investment banking fees related  
4 to bringing in the refinancing loan with the additional \$10  
5 million. So we couldn't get the money. Mr. Troutman is our  
6 media expert and there's a lag. What he's saying, as a  
7 media expert, is that you don't have immediacy to the  
8 failure of fund, the marketing and promotional expenses. So  
9 he looks at Spanish Broadcasting's five most significant  
10 markets and he determines based on a ratings decline  
11 compared to our competitors, that we suffered a ratings  
12 decline and a time committing \$13 million reduction of  
13 EBITDA in 2010.

14 And then you turn to Mr. Kerns, and looking at  
15 market comps, he applies the 6.75 multiple to that. Let's  
16 get this up. I apologize. He applies the EBITDA margin of  
17 28.6 to the \$13 million to arrive at 3.6. He then applies  
18 the multiple to that to yield the \$24.5 million dollars of  
19 damages.

20 The law is, Your Honor, and this is at page 28 of  
21 our brief, that the question of whether damages are direct  
22 or consequential is a question of fact and Lehman cites  
23 cases to the contrary, but all of the cases that they cite  
24 are lost profits cases and this is not a lost profits case.  
25 This is a diminution in value case. And the difference is

1 by not funding the \$4 million of marketing and promotional  
2 expenses, they damaged our brand which led to a reduction --

3 THE COURT: So where does it say all of this in  
4 the credit agreement? It's a credit agreement. It's an  
5 agreement to loan money.

6 MS. PRIMOFF: Right.

7 THE COURT: Right.

8 MS. PRIMOFF: Or working capital that they told us  
9 we should have.

10 THE COURT: So let me go back to the swap  
11 termination. So you terminated the swap in 2010, right?  
12 And the refi was in 2012, right?

13 MS. PRIMOFF: Yes.

14 THE COURT: So you get to claim as damages your  
15 expenses in connection with the refi that you did in 2012  
16 for a swap that you terminated in 2010?

17 MS. PRIMOFF: Yes.

18 THE COURT: Is Spanish Broadcasting still  
19 incurring damages as a result of LCPI's failure to fund this  
20 loan?

21 MS. PRIMOFF: Well, we quantified at the 24.5  
22 million dollars through the combination of Troutman's  
23 analysis and Kern's analysis. It's not --

24 THE COURT: But if we go to trial next year then  
25 there are going to be more damages.

1 MS. PRIMOFF: No. No, because the analysis, it  
2 looks at terminal values and market multiples and --

3 THE COURT: I see.

4 MS. PRIMOFF: -- and that kind of stuff. It takes  
5 that into account. Direct damages are the natural and  
6 probable consequence of the breach. That's what Lehman said  
7 in its opening brief, that's the formulation thought the  
8 experts took into account.

9 Again, these are not lost profits damages. This  
10 is diminution in value damages and the Second Circuit has  
11 accepted that as a measure of damages in the TECO Metals  
12 case. The UCC also recognizes the distinction between  
13 diminution in value damages and consequential damages. And  
14 (indiscernible) recognized the distinction in an article,  
15 albeit in the M&A context, but the context spoke to  
16 contractual damages.

17 And again, Your Honor, we don't have a summary  
18 judgment motion so it's not as though we're here today  
19 saying, you know, we should win and walk away with 24.5  
20 million and 17 million. What we're saying is that there are  
21 material issues of disputed fact that go to the question of  
22 whether these damages are consequential or direct and that  
23 we're entitled to proceed to trial and demonstrate that they  
24 are direct and that they're compensable.

25 I would just point Your Honor, if I may --

1 THE COURT: Sure.

2 MS. PRIMOFF: -- to two cases cited in our papers.

3 THE COURT: Okay.

4 MS. PRIMOFF: The first I think I've mentioned  
5 which is U.S. v. ASCAP cited at pages 23 and 24.

6 THE COURT: All right.

7 MS. PRIMOFF: And then the second is Scientific  
8 Components v. Raytheon --

9 THE COURT: Right.

10 MS. PRIMOFF: -- which specifically dealt with a  
11 waiver of consequential damages and it was not --

12 THE COURT: Well, in the Raytheon case there was  
13 actually a section that listed sections which would not  
14 survive termination, right? Right.

15 MS. PRIMOFF: Yes, and we have the functional  
16 equivalent here because we've got provisions that say this  
17 will survive, this will survive and nowhere does --

18 THE COURT: Show me the functional equivalent.

19 MS. PRIMOFF: Show you?

20 THE COURT: Yes, what are you talking about the  
21 functional equivalent of a section of a survival section?

22 MS. PRIMOFF: What it is is it's broken out in the  
23 context of this agreement. So it says 10.5, the contingent  
24 obligations will survive.

25 THE COURT: Where are you referring to, in the

1 credit agreement?

2 MS. PRIMOFF: Both in the credit agreement --

3 THE COURT: Well, I'm just asking you to show me.

4 So in the credit agreement you say 10.5 is the survival  
5 provision?

6 MS. PRIMOFF: No, there's nothing -- I'm sorry.

7 There's nothing that's called a survival provision.

8 THE COURT: Okay.

9 MS. PRIMOFF: There are provisions throughout the  
10 documents that say this will survive. So just bear with me  
11 a second, please. Okay. So the credit agreement 2.19(c),  
12 it says the obligations of the borrower pursuant to this  
13 section shall survive the termination of the agreement and  
14 the payoff --

15 THE COURT: Right. So there's not a separate  
16 section in the credit agreement with a heading, which would  
17 have no meaning because headings have no meaning, which says  
18 survival of provisions. There's none of that.

19 MS. PRIMOFF: Correct.

20 THE COURT: So you're pointing me to one  
21 particular provision that says that this will survive,  
22 right?

23 MS. PRIMOFF: Yes, and then Section 2 --

24 THE COURT: But wait, not so fast.

25 MS. PRIMOFF: Okay.

1 THE COURT: But the one you just showed me has the  
2 magic word "obligations". A waiver is not an obligation.

3 MS. PRIMOFF: Okay. Let's look at 2.20(e).

4 THE COURT: 2.20(e). Okay. But again, I'm just  
5 taking you at your word and you are point me to a case that  
6 I think says that there's a section that deals with it that  
7 in other words makes a list of the survival of obligations,  
8 right? So we don't have that here.

9 MS. PRIMOFF: No, we don't have that but I think  
10 that's a distinction without a difference, respectfully,  
11 because there are various provisions of the credit agreement  
12 and the payoff letter that say this will survive. And they  
13 --

14 THE COURT: So okay. So let's pause on this one.  
15 So you say the parties signed this credit agreement and you  
16 say that at that moment in time, if that agreement were to  
17 have terminated the next day, forget the payoff letter.  
18 That because you've got a provision 10.12 that says we  
19 hereby irrevocably and unconditionally waive consequential  
20 damages and you're saying that because it didn't also say  
21 this provision survives termination of the agreement that  
22 when the agreement terminates that provision doesn't  
23 survive.

24 MS. PRIMOFF: That is the law according to ASCAP.

25 THE COURT: But that would be an absolutely

1 extraordinary thing --

2 MS. PRIMOFF: Well, then why --

3 THE COURT: -- for the clear words to say I hereby  
4 unconditionally waive. Not I shall waive, not I promise in  
5 the future, right now I waive. But if it terminates I no  
6 longer waive. So if, for example, the worst economic  
7 meltdown since the Great Depression happens, the waiver goes  
8 away and the sky is the limit on consequential damages and  
9 all of that is what the parties intended.

10 MS. PRIMOFF: All I'm saying, Your Honor, is that  
11 in 2.19(c) they manage to say "shall survive" and in 2.20(e)  
12 they said "shall survive" and if they intended for 10.12(e)  
13 to say "shall survive", it should have said "shall survive".

14 THE COURT: What's the point of it? Under what  
15 circumstances would it have any teeth? It becomes a  
16 nonsensical provision if you need to also have this magic  
17 mantra of that it shall survive? It is an act that occurs  
18 in the past. It is a waiver. It happened. There's --

19 MS. PRIMOFF: But waivers can be undone and we  
20 think that by virtue of the payoff letter, which also did  
21 the same thing in terms of "shall survive", we think it  
22 didn't. I mean, the Getlitz declaration says that the word  
23 expressly was put in there to say "expressly survive". That  
24 if it wasn't listed and it wasn't mentioned in the credit  
25 agreement that it didn't survive and that's what the Getlitz

1 declaration says and "expressly" meant something. We came  
2 back and we said "expressly".

3 THE COURT: So if Ms. Getlitz gets on the stand  
4 and I were to ask her did you have direct discussions with  
5 your counter-party about the need to undo the consequential  
6 damage waiver, she would say yes?

7 MS. PRIMOFF: No, she would say no.

8 THE COURT: She would say no. Because nobody  
9 thought that's what they were doing on the LCPI side.

10 MS. PRIMOFF: I can't speak to what they thought  
11 on their side, but it's clear, based on the affidavit  
12 submitted to Your Honor, as to what we thought they were  
13 doing on our side. Unless the Court has further questions,  
14 I have nothing further, Your Honor.

15 THE COURT: Thank you.

16 Mr. Miller, do you want to deal with the  
17 "expressly" point?

18 MR. MILLER: Yes, Your Honor. I will deal with  
19 that point. The sequence here, if we look back at Tab 5 --

20 THE COURT: And also, if you could deal with  
21 Ms. Primoff's points about the numerous provisions in the  
22 credit agreement that have a built-in survival clause.

23 MR. MILLER: Yes, Your Honor. I'll try to do  
24 that. Starting with the payoff letter in Tab 5, let's go  
25 back to the language. The credit agreement and all

1 obligations of the borrower and other loan parties therein  
2 and under the other loan documents shall be terminated. It  
3 does not say are hereby retroactively terminated. It  
4 doesn't say they're rescinded. It says they shall be  
5 terminated other than contingent obligations which expressly  
6 survived by the terms of the credit agreement or such other  
7 loan documents including without limitation Section 10.5 of  
8 the credit agreement.

9 And if we look at Section 10.5 and the other  
10 sections that do expressly survive, we find that they are  
11 things that are fairly typical, long-term continuing duties  
12 that people should have like (indiscernible) expenses was  
13 10.5 that they agreed to reimburse for things that were  
14 necessary after the termination to be done.

15 And there are provisions, I think, on  
16 confidentiality. There are some other things here like, I  
17 think, 10.14 may be one of those that survives. In any  
18 event, all of these are the things that are going to be  
19 ongoing future events. The waiver, as the Court has  
20 correctly analyzed it, was over and done with and it applied  
21 in the past. I think the Court has already deal with the  
22 Raytheon case correctly with express exception, but I wanted  
23 to explain why I think the ASCAP case actually also provides  
24 a very helpful analysis of this for our position.

25 If you look at the ASCAP case, and the facts are a

1 little bit complicated there, but it had to do with an  
2 ongoing loyalty dispute and there were certain parties,  
3 radio stations that were actually going to sit out the  
4 royalty dispute, but they agreed to be -- they had temporary  
5 licenses and they agreed to be bound by the outcome of that  
6 proceeding and the dispute was how long did that agreement  
7 continue? And that agreement was terminated and they said,  
8 well, we ought to be able to now have a new dispute.

9 Footnote 9 makes the very important point in the  
10 ASCAP decision. It is not disputed that the waiver  
11 provision bars the stations from instituting a separate  
12 proceeding with regard to the period covered by the  
13 extension to the extent that ASCAP also hoped that the  
14 waiver language would bar later proceedings for periods  
15 after the extension event agreement had been terminated,  
16 however, such a unilateral expectation cannot be enforced  
17 absent explicit language in binding it.

18 In essence, it's a little bit flipped in  
19 positions, but the Court rejected the very argument that she  
20 is making here about an unexpressed expectation. But the  
21 Court says the waiver provision applied to all the things  
22 that happened while it was in effect, which is the point  
23 here, the waiver was in effect at the time of the failure to  
24 fund. It was in effect at the time the claim was filed and  
25 the claim was merely carved out of the release. There is

1 nothing to do with the claim.

2 And I might add that, and I know we're going out  
3 of the record a little bit, Ms. Primoff said that there was  
4 hundreds of millions of dollars paid. I understand that the  
5 portion that LCPI received was more in the nature of 10  
6 million of that money from things it had done before, but it  
7 was certainly less than the value of the \$40 million claim  
8 and we would be able to show that if went forward.

9 The point is, you were absolutely right on the  
10 economics here. It made absolutely no economic sense for  
11 LCPI to agree to give up its very strong defense that it  
12 thought it had to the excessive and bloated claim, in its  
13 view, in the words of Judge Peck, to give that up for  
14 nothing. And so, you know, Your Honor, we think that that -  
15 - you know, we think your analysis is absolutely correct.

16 A couple of other points --

17 THE COURT: So under that theory, just to keep  
18 following it, LCPI, if you will, as administrative agent,  
19 takes one for the team for the bank group?

20 MR. MILLER: That would be the theory, yes, Your  
21 Honor. But in order for the bank group to get most of the  
22 other people to get their money in the door, LCPI gives up  
23 this claim but -- and that this is -- if this were the  
24 agreement, it's just really hard to believe that Spanish  
25 Broadcasting wouldn't say, you know, we really want a for

1 avoidance of doubt clause on that. That's really important  
2 to us.

3 I mean, to some extent the important of it to them  
4 is also a reason why you would expect that if they really  
5 thought that was the deal they were making they would have  
6 put it in here. I mean, it's just hard to believe that it  
7 was not. And sticking to the word "expressly", and again,  
8 unless this is sort of, you know, trick drafting, trying to  
9 sneak one by, which I'm not suggesting is, the logic is that  
10 if the parties really made that deal this would be front and  
11 center and it was something that was there. I might add  
12 that it's not even clear that LCPI signed the payoff letter.

13 THE COURT: Well, it signed the letter as an agent  
14 bank, right? As the agent, not as a party, right?

15 MR. MILLER: Yes, it did sign it as an  
16 administrative agent. It actually did not sign it, but as  
17 administrative agent, I think, Your Honor, arguably it  
18 signed for all the bank group, but it certainly did not sign  
19 as (indiscernible).

20 I might also point out, Your Honor, one of the  
21 inconsistencies of their argument is that the obligation to  
22 repay doesn't have survival language. You know, I mean, if  
23 the credit agreement is really terminated it doesn't even  
24 have to pay at all and, you know, and by the way, if they  
25 really terminated everything, it's not clear why they still

1 have a claim for the loss although the claim is preserved.  
2 I mean, this whole idea that everything was terminated  
3 except things that expressly survived and the fees that are  
4 called out, it just -- again, plain language, we think,  
5 answers the question.

6 THE COURT: All right.

7 MR. MILLER: With regard to the damages theory,  
8 just very quickly, I do want to mention that at the April  
9 27th hearing the Court asked Ms. Primoff, do you have a  
10 universe of documents that you think demonstrate your  
11 damages and she said yes. And you had asked, have you  
12 produced those and she said yes. So the record is complete,  
13 we think, on the damage issue.

14 And Your Honor, there's also -- I mean, there's a  
15 lot of sort of almost nonsense in the way some of the  
16 damages work. One of the points, for example, is that under  
17 the credit agreement, if they had gotten the \$10 million  
18 draw it would have reached maturity in 2010, two years  
19 later. And yet their investment banker calculates the cost  
20 somehow of that \$10 million for a future time after 2010. I  
21 mean, it's really -- the report is just not well put  
22 together, but the point is it's got all kinds of stuff hung  
23 on it which is clearly consequential damages. It's all  
24 consequential damages.

25 So for those reasons, Your Honor, I'd be happy to

1 answer any other questions the Court may have, but we  
2 believe the record is complete, the record is clear. This  
3 is a summary judgment case. The plain language, as you  
4 said, of the waiver was irrevocable, it was unconditional,  
5 it was operative, it was in effect at the time of all the  
6 events that gave rise to the claim at the time the claim  
7 was, in fact, filed.

8 The payoff letter certainly does not have the  
9 clarify necessary to set aside that sort of material  
10 provision. If it applies, as a matter of law, the first two  
11 components of damages, the impacted EBITDA damages and the  
12 swap damages are certainly consequential or special and  
13 under those circumstances we could resolve 99 percent of the  
14 case in summary judgment and ask you to do so, Your Honor.  
15 Thank you.

16 THE COURT: Thank you.

17 Anything further, Ms. Primoff?

18 MS. PRIMOFF: No, Your Honor.

19 THE COURT: Okay. Thank you very much. If you  
20 have a few minutes, I'm wondering if you could join me for a  
21 conference off the record, all right? I'll let you decide  
22 whomever you'd like to bring with you.

23 (Whereupon these proceedings were concluded at 11:34  
24 AM)  
25

C E R T I F I C A T I O N

I, Jamie Gallagher, certify that the foregoing transcript is  
a true and accurate record of the proceedings.

Jamie Gallagher

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Date: 2015.10.14 11:20:15 -04'00'

Jamie Gallagher

I, Debra McCostlin, certify that the foregoing transcript is  
a true and accurate record of the proceedings.

Debra McCostlin

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Debra McCostlin

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